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December 20, 2012

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in MB Docket No. 09-182

Dear Ms. Dortch:

On December 18, 2012, Barry Faber, Executive Vice President and General Counsel of Sinclair Broadcast Group, Inc. ("Sinclair"), and Clifford Harrington and Paul Cicelski of Pillsbury Winthrop Shaw Pittman LLP, met with William Lake, Chief of the Media Bureau, Sarah Whitesell, Deputy Chief of the Media Bureau, Brendan Holland, Deputy Chief of the Industry Analysis Division, and Benjamin Arden, Attorney Advisor, Industry Analysis Division. Mr. Faber followed up this meeting with a brief email to Messrs. Lake, Holland and Arden.[1]

During a wide-ranging conversation, the parties discussed issues regarding the FCC's pending Notice of Proposed Rulemaking in the above-referenced proceeding.[2] The parties also discussed recent reports indicating that the FCC may modify its rules to make Joint Sales Agreements ("JSAs") between television stations in the same market attributable interests.

At the outset, Mr. Faber inquired as to why the FCC would seek to attribute TV JSAs given that he has seen no evidence in the FCC's record indicating that television stations control the programming of stations they "broker" through JSAs or that

[1] A copy of Mr. Faber's email is attached hereto.

[2] *2010 Quadrennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Notice of Proposed Rulemaking (2011).

television JSAs are in any way anticompetitive. Mr. Faber explained that JSAs have become extremely common in the TV industry since the FCC last looked at the JSA-attribution issue in 2004, and that the FCC has continued to approve transactions involving JSAs throughout this time. Mr. Faber noted that the FCC has approved a number of applications in which Sinclair would provide sales services pursuant to JSAs in the last year or so, and approved a number of Sinclair transactions involving JSAs within the last month.

Mr. Faber also queried:

(1) Why is it that, given both the FCC, and the Department of Justice ("DOJ") under the Hart-Scott-Rodino antitrust review process, have repeatedly approved transactions involving JSAs, would the Commission now be in a rush to make same market TV JSAs attributable, especially in light of the fact that the DOJ has adopted rational methods for analyzing competition based on the characteristics of particular geographic and economic markets instead of the "one size fits all" approach proposed by the Commission?

(2) Why would the Commission suddenly find a need to make JSAs attributable when, at their core, JSAs are cost-saving arrangements that have nothing to do with the control of television programming?

(3) Why does the Commission care about non-news programming decisions, when those decisions are often the result of a pre-existing network affiliation, and when the choice of syndicated fare typically comes down to whether to run "Judge Judy" or "Judge Joe Brown" in an afternoon time slot?

(4) Can the Commission substantiate its expressed concern that sales entities control or unduly influence the programming of stations to which they provide services pursuant to JSAs? Mr. Faber pointed out that, while sales agents -- much as networks, sales representatives, ratings agencies, and programming consultants -- do provide data as to the potential economic value of various programming alternatives, it is the licensee which must consider that data and ultimately decide which programming to broadcast. Mr. Faber pointed out Sinclair's experience, in which it makes sure that programming decisions are those of the licensee, and gave an example of a situation in which a station licensee had considered but rejected advice as to the likely sales success of programming on a station to which Sinclair provides sales services.

(5) Is it fair to attribute television station JSAs when giant cable competitors use their own quasi-JSAs, called "interconnects", to sell local advertising on dozens of ad-supported networks across entire television markets in direct, head-to-head competition with local broadcasters? Although Sinclair does not believe either cable interconnect agreements or JSAs should be regulated by the FCC, the use of interconnects allows multichannel video program distributors ("MVPDs") to combine forces on local advertising sales and such agreements have substantially impacted the ability of individual television stations to compete with MVPDs for local ad dollars. He also noted that the combined MVPD sales operations in local markets are generally one of the largest sources of local television advertising sales in a market.

(6) Why is the Commission anxious to make TV JSAs attributable between two separately owned television stations in a local market yet apparently has no concern with allowing separately owned cable systems to sell dozens of channels jointly in the same market, such as the deals Comcast has to sell all of the commercial inventory for Verizon FiOS where Comcast overlaps with its direct competitor?

Mr. Faber asked the staff what they believed to be the ultimate goal of the local TV duopoly rule and how the lack of a duopoly rule would harm competition. Mr. Faber pointed out that the D.C. Circuit had determined in the *Sinclair Broadcast Group* case that the "eight voices" test is arbitrary and capricious,[3] and that the FCC itself has previously determined it to be unnecessary to promote competition.[4] Mr. Faber noted that the Commission has itself discarded economic competition as the basis for the duopoly rule, and had substituted a new "competition for viewership" test in order to avoid the Congressional mandate under Section 202(h) of the Telecommunications Act that the Commission eliminate all ownership limitations not "necessary in the public interest as the result of competition."

Mr. Faber asked if staff is aware that those proposing to eliminate news sharing arrangements operate under the mistaken understanding that if only news sharing were eliminated, there would be a dramatic expansion of the number of stations providing independent newscasts. According to Mr. Faber, this theory does not reflect the competitive real-world business of television broadcasting. He stated that, in reality, the alternative to a station receiving its news from another station in the market is not, in most cases, for the receiving station to produce its own news. The real result would be no

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[3] *See Sinclair Broad. Group, Inc.v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).
[4] *See 2002 Biennial Review*, 18 FCC Rcd 13620 (2003).

news programming at all on the receiving station, and fewer news resources at the station providing news. The net result would be less news available to local viewers, not more. Mr. Faber noted that experience within Sinclair's operations, both providing and receiving local news pursuant to news sharing arrangements, strongly suggests that such arrangements are a necessary component for many stations to broadcast any news at all.

In response to a question Mr. Faber received regarding how he would "tweak" the duopoly rule if given the opportunity, Mr. Faber responded that he thought that the duopoly rule itself should be eliminated, but that if that does not occur, one possible change would be to eliminate the "8-voices test" and modify the "Top-Four" aspect of the rule and to make it a "Top-Three" rule. According to Mr. Faber, this is because Fox affiliated stations are very unlike affiliates of the other Big-three networks as a result of (1) receiving far fewer hours of network programming, (2) the lack of significant network news, (3) the far fewer hours of local news programming and (4) the relative newness of Fox stations in contrast to the legacy nature (particularly in news programming) of most affiliates of ABC, CBS and NBC.

Mr. Faber noted that in a major market like Baltimore, Sinclair is prohibited from owning two television stations (the Fox affiliate and the CW) in the market because, due to the proximity of Baltimore to other large markets in Philadelphia and Washington, D.C., the Commission has allocated less than eight independent voices to the Baltimore market. Similarly in Cincinnati, Ohio, Sinclair was required to divest the MyNetwork affiliate in order to buy the CBS affiliate in that market despite the lack of market power that would exist if it were allowed to continue to own the low-rated MyNetwork affiliate. Mr. Faber questioned the rationality of the "8 voices test" portion of the TV duopoly rule in that it prohibits duopolies such as these, and many others, while at the same time in Baltimore, for example, Comcast could buy the number one station in the market despite the fact that Comcast is the dominant cable provider, sells the commercial inventory for its primary competitor, FiOS, owns the NBC and Telemundo television networks, owns numerous popular cable channels such as MSNBC, USA, Bravo, E!, Oxygen and CNBC and has a substantial interest in the rapidly growing over-the-top Internet service Hulu.

Noting his understanding that MVPDs have been some of the primary proponents of limiting joint operations of television stations, Mr. Faber noted that cable providers are television stations' primary competitor for advertising sales and their motivation in seeking to handicap their competitors should be taken into account in considering their views. Mr. Faber noted further that such commentators are also motivated by a desire to gain leverage in the negotiation of retransmission consent and the fact that despite the existence of numerous JSAs, most television broadcasters today receive far less compensation relative to non-broadcast networks, such as ESPN and USA Network, which have lower programming costs and substantially lower ratings than local television stations, and which do not provide the public interest benefits of local broadcast stations (such as news and emergency information), conclusively shows that TV JSAs do not create excess market power for television broadcasters.

Finally, Mr. Faber noted that the JSA proposal relates back to a stale, 2004 proceeding, that the record on that proposal provides no concrete examples of negative consequences of JSAs, and indeed few concerns expressed by commenters (other than those seeking to limit the retransmission consent payments to broadcasters) and has not been adequately developed in the record of the current Quadrennial rulemaking proceeding. He pointed out that unlike the marketplace that existed at the time of the FCC's 2004 JSA proceeding, in today's marketplace cable companies are the primary source of competition with television broadcasters for advertising revenue in local markets. It was also discussed during the meeting that FCC rules do not require that the Commission be made aware of many JSAs which have been entered into over the past eight years and, as a result, does not have a full understanding of the need for such contractual relationships under current market conditions impacting the industry or the impact of such arrangements on television operations. As a result, Mr. Faber suggested it would be appropriate for the Commission to slow down its apparent rush to judgment and to reopen the comment period of the 2004 JSA NPRM to allow the record to be more fully developed based on current market conditions.

Should you have any questions, please direct them to the undersigned.

Sincerely yours,

Clifford M. Harrington

cc: William Lake
Sarah Whitesell
Brendan Holland
Benjamin Arden

From: Barry Faber <BFaber@sbgtv.com>
Sent: Thursday, December 20, 2012 12:20 PM
To: William.Lake@fcc.gov
Cc: brendan.holland@fcc.gov; benjamin.arden@fcc.gov
Subject: Follow-up to Tuesday's Meeting

Bill – Thanks very much for taking the time to meet with us. Always enjoy the opportunity to discuss issues with you. One thing I don't think I adequately expressed at the meeting regarding the apparent plan of the FCC to make television JSAs attributable was Sinclair's view that at a minimum the Commission should slow the process down and reopen the comment period with respect to such a proposed rule. As you noted during the meeting, the JSA attribution NPRM was issued in 2004. In the more than eight years that have passed since then, tremendous changes have occurred in the market, including as I mentioned during our meeting the exponential growth of cable and other MVPDs as direct competitors to television stations in the sale of local advertising, which have led to a far greater use of JSA structures in the industry than existed in 2004. As a result of the significant time delay from issuance of the NPRM to promulgation of the rule, the record has become incredibly stale and out of date. Interested parties should have the opportunity to update the record that would be permitted by a delay in action, so that the Commission can reach conclusions based on current marketplace conditions. Thanks again – Barry

P.S. I would appreciate if you would forward this email to Sarah Whitesell, as I do not have her email address. Thank you.